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Sovereign Immunity Of Foreign Merchant Vessels - Flota Maritima Browning v. Motor Vessel Ciudad

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Sovereign Immunity Of Foreign Merchant Vessels

Flota Maritima Browning v. Motor Vessel Ciudad[1]

In a libel in rem against the vessel Ciudad de la Habana, the libellant sought damages for the alleged breach of two lease-purchase agreements. Prior to filing his suit, libellant had notified the owner-lessor, a Cuban corporation, of the alleged breaches and disclaimed any future responsibility under the contracts. Thereafter, on June 5, 1959, the vessel was sold to the Republic of Cuba, and the shipping agent who was in control of the vessel was notified by the Cuban corporation that he was henceforth to act as agent for the Cuban government.[2] On June 22, 1959 the libel was brought and the vessel was seized pursuant to that libel. On October 27, 1960 the Republic of Cuba entered its appearance in the case, claimed ownership of the vessel, prayed to defend and filed an answer but failed to raise the defense of sovereign immunity. In fact, a plea of sovereign immunity was not filed until May 11, 1962.[3] In refusing to

[1] The Daily Record, August 24, 1964, p. 2 (4th Cir. 1964).

[2] *Ibid.* The recognition and acceptance of Cuba's right of control and ownership by the agent who was in control of the ship at the time it was libelled was undoubtedly considered to be sufficient control under the rule of the *Navemar* case, which required "actual possession by some act of physical dominion or *control in behalf* of the Spanish Government . . . or at least some recognition . . . that they were controlling the vessel and crew in behalf of their government." (Emphasis added.) Compania Espanola v. The Navemar, 303 U.S. 68, 75-76 (1938). See generally, *infra* note 26 for cases applying this rule.

[3] The Daily Record, August 24, 1964, p. 2 (4th Cir. 1964). The State Department made no suggestion with respect to sovereign immunity, although requested to do so by representatives of the Republic of Cuba.

recognize this defense, the district court held that the failure to make a timely assertion of such immunity prior to the merits being placed in issue constituted a waiver by the Republic of Cuba of its right to claim such immunity.[4] In the principal case, the Fourth Circuit Court of Appeals affirmed the decision of the district court.

Although the majority did not reach the substantive issue of sovereign immunity, it suggested that the principle of immunity applicable to foreign vessels under United States foreign relations law is that principle known as "restrictive" or "relative" sovereign immunity, a principle "which has not been, but in time probably will be, adopted by the Courts of the United States."[5] Under the "restrictive" doctrine, a distinction usually is made between private-commercial activities *(jure qestionis)* and public activities *(jure imperii)*. Immunity from jurisdiction of foreign courts is preserved in the case of state-owned and state-operated vessels engaged in non-commercial and governmental activities, while state-owned and state-operated ships engaged in commercial, non-governmental activities are treated in the same manner as are ordinary private-commercial vessels and are not granted immunity.[6]

Despite the contention of the majority that the doctrine of "absolute sovereign immunity" is no longer applicable to merchant vessels under United States law, the dissent argued that the "absolute" doctrine is still the law as

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[4] 218 F. Supp. 938, 943-4 (D. Md. 1963). The district court quoted as support for the holding, RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 74 (Proposed Official Draft 1962).

[5] The Daily Record, August 24, 1964, p. 2, n. 10 (4th Cir. 1964). The court therein referred to the RESTATEMENT, *supra* note 4, § 72, which states in pertinent part:

> "The immunity . . . does not apply to proceedings arising out of commercial activities that the state carries on outside its own territory."

[6] One of the clearest pronouncements of the restrictive doctrine as applied to government vessels is to be found in the Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Vessels generally referred to as the Brussels Convention of 1926. Article I provides:

> "Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on Government vessels, and the States owning or carried on Government vessels, and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipments."

Article 2 provides that the same legal rules and procedures are available as in the case of privately owned vessels.

Article 3 draws the pertinent distinction as to governmental activities.

> "The provisions of the two preceding Articles shall not be applicable to ships of war, Government yachts . . . and other craft owned or operated by a State, and used at the time a cause of action arises exclusively on Governmental and non-commercial service, and such

enunciated by the Supreme Court and should, therefore, have been applied in the instant case.[7] This division of opinion is indicative of the unsettled status of the United States law applicable to jurisdictional immunities of vessels.[8] The doctrine of *absolute* sovereign immunity[9] was established in American law[10] by Chief Justice Marshall in the classic opinion of *The Schooner Exchange v. McFaddon*,[11] where the Court held that an armed ship of France, which was under the immediate and direct control of the sovereign and employed by him in national objectives, was exempt from the jurisdiction of the territorial sovereign, the United States.[12] The Chief Justice stated the doctrine in these terms:

> "[F]ull and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

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vessels shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings *in rem*." II HACKWORTH, DIGEST OF INTERNATIONAL LAW 463-64 (1940).

See generally, Harvard Research in International Law — Draft Convention, *Competence of Courts in Regard to Foreign States*, 26 Am. J. Int'l. L. 451 (Supp. 1932).

[7] The Daily Record, August 24, 1964, p. 2, cols. 5-6 (4th Cir. 1964).

[8] SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW 71-81, 182-202 (1959); see Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Yb. Int'l. L. 220, *Appendix* (1951).

[9] The doctrine of jurisdictional immunities of foreign vessels is based essentially on state sovereignty, a dominant principle of public international law; therefore, the question of state immunity in relation to vessels is also a legitimate subject of international law. SUCHARITKUL, *op. cit. supra* note 8, at XV.

[10] International law is a part of the law of the land and will be applied by the courts of the United States. BISHOP, INTERNATIONAL LAW 65-8 (1953). But, such decisions as to immunity are evidence of international law but are not international law itself. Timberg, *Sovereign Immunity, State Trading, Socialism and Self-Deception*, 56 NW. U.L. REV. 109, 117 (1961).

[11] 11 U.S. (7 Cranch) 74 (1812).

[12] *Id.* at 147.

> "This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation."[13]

In 1926, in *Berizzi Bros. v. S.S. Pesaro*,[14] the Supreme Court faced for the first time the issue whether a merchant vessel owned, possessed and operated by a foreign sovereign in the carriage of merchandise for hire was immune from arrest upon a libel in rem. The libel was filed against the steamship Pesaro for damages arising from failure to deliver certain silk accepted by her at Italy. Recognizing that the *Exchange* decision did not apply to merchant vessels, the Court went on to hold that the principles of immunity which were enunciated in that decision were pertinent to the *Berizzi* case. The Court, by Justice Van Devanter, stated:

> "We think the principles are applicable alike to all ships held and used by a government for a *public purpose*, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force."[15]

By applying the doctrine of absolute immunity to a government-owned merchant vessel the Court rejected an earlier well-considered lower court decision, on the same

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[13] *Id.* at 137. *But see* Lauterpacht, *supra* note 9, at 229:

> "[I]t is doubtful whether that decision can accurately be quoted as an authority in favour of the rigid principle of jurisdictional immunity of foreign states. It is clear from the language of that decision that the governing, the basic, principal is not the immunity of the foreign state but the full jurisdiction of the territorial state and that any immunity of the foreign state must be traced to a waiver — express or implied — of its jurisdiction on the part of the territorial state. Any derogation from that jurisdiction is an impairment of the sovereignty of the territorial state and must not readily be assumed."

[14] 271 U.S. 562 (1926).

[15] *Id.* at 574. (Emphasis added.) The use of the term "public purpose" by the Court does not here refer to the distinction made under the restrictive immunity doctrine. Here the Court is concerned with ends of governmental activity rather than with the activity itself (whether it is commercial or non-commercial).

facts, which applied the restrictive doctrine.[16] In that case, *The Pesaro,* the lower court was of the opinion that

> "[A] government ship should not be immune from seizure as such, but only by reason of the nature of the service in which she is engaged.
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> "And as the Pesaro was employed as an ordinary merchant vessel for commercial purposes at a time when no emergency existed or was declared, she should not be immune from arrest in admiralty, especially as no exemption has been claimed for her, by reason of her sovereign or political character, through the official channels of the United States."[17]

Prior to the *Berizzi* decision, sovereign immunity generally had been granted to merchant vessels on the basis of international comity.[18] And, both before and after *Berizzi,* the requirement of devotion of the vessel to a public purpose was recognized.[19] The courts, however, in order to limit the doctrine of absolute immunity, required, as evidence of the ship's being operated by the state for public purposes, that the ship be either owned and possessed or merely possessed and controlled or managed by the foreign government.[20] This requirement was based upon the con-

[16] The Pesaro, 277 Fed. 473 (S.D. N.Y. 1921), *rev'd on other grounds,* 255 U.S. 216 (1921). This case dealt with the same subject matter as the *Berizzi* case, 271 U.S. 562 (1926), but was dismissed when the court vacated the arrest by consent of the parties because of incorrect procedure in claiming immunity. A new suit was instituted giving rise to the Berizzi decision.

[17] 277 Fed. 473, 482 (S.D. N.Y. 1921). The court here makes a distinction between "immunity" and "exemption". For such distinction see BISHOP, *op. cit. supra* note 9, at 417:

> "In considering these immunities, it is frequently desirable to distinguish between immunity from jurisdiction (in the sense that the foreign state or its representative cannot be made an unwilling party defendant), and exemption from the application of the law (in the sense that the territorial law does not apply to the acts of the agency claiming exemption, even . . . after the expiration of the immunity from jurisdiction or its waiver)."

[18] The Adriatic, 258 Fed. 902, 904 (3d Cir. 1919); The Augustine, 8 F. 2d 287, 289 (S.D. N.Y. 1924); The Luigi, 230 Fed. 493, 496 (E.D. Pa. 1916). These cases dealt with suits against private merchant vessels requisitioned by foreign governments. In The Athanasios, 228 Fed. 558, 560 (S.D. N.Y. 1915) the court declined jurisdiction for political reasons.

[19] Compania Espanola v. The Navemar, 303 U.S. 68, 74 (1938); The Roseric, 254 Fed. 154, 161-62 (D. N.J. 1918):

> "[I]t is not the ownership or exclusive possession of the instrumentality by the sovereign, but its appropriation and devotion to such service, that exempts it from judicial process."

[20] The Carlo Poma, 259 Fed. 369 (2d Cir. 1919), *decree vacated,* 255 U.S. 219 (1921); The Uxmal, 40 F. Supp. 258 (D. Mass. 1941); The Pampa, 245 Fed. 137 (E.D. N.Y. 1917); The Johnson Lighterage Co. No. 24, 231 Fed. 365 (D. N.J. 1916). A hint of the application of the restrictive doctrine arose in The Beaton Park, 65 F. Supp. 211, 212 (W.D. Wash. 1946), where the court said: "[I]t was not a government function that was being

cept that the property becomes a part of the sovereign, not because it is owned by the sovereign, but because it is devoted to public use and employed in carrying on the operations of government.[21] It follows that a privately owned vessel employed by a foreign government for public purposes enjoys the same immunity as state-owned ships used in public service.[22] And, therefore, the Supreme Court in *Compania Espanola v. Navemar*,[23] established actual possession and not ownership as the real test of immunity.[24] The Supreme Court, declaring that the want of admiralty jurisdiction and the right of the Spanish Government to demand possession of a vessel were appropriate subjects for judicial inquiry, held:

> "The decree of attachment, without more, did not operate to change the possession which, before the decree, was admittedly in petitioner. To accomplish that result, since the decree was *in invitum*, actual possession by some act of physical dominion or control in behalf of the Spanish Government, was needful, . . . or at least some recognition on the part of the ship's officers that they were controlling the vessel and crew in behalf of their government."[25]

A further limitation of claims of immunity has been accomplished by restricting the procedures available for claiming such immunity. One usual procedure is for a recognized and authorized representative of a country to make a special appearance for the purpose of claiming immunity.[26] The more recognized method of asserting im-

pursued. It was merely an ordinary commercial operation of a merchant ship owned but not possessed or operated by the foreign government." Thus the Court ultimately relied upon the possession test. See also Note, *Immunity from Suit of Foreign Sovereign Instrumentalities and Obligations*, 50 YALE L.J. 1088, 1089 (1941).

[21] The Fidelity, 8 Fed. Cas. 1189, 1191 (No. 4,758) (C.C.S.D. N.Y. 1879); The Uxmal, *supra* note 20, at 261.

[22] The Western Maid, 257 U.S. 419 (1922).

[23] 303 U.S. 68 (1938).

[24] See generally Yokohama Specie Bank, Ltd. v. Cheng T. Wang, 113 F. 2d 329 (9th Cir. 1940), *cert. denied*, 311 U.S. 690 (1940); Ervin v. Quintanilla, 99 F. 2d 935 (5th Cir. 1938), *cert. denied*, 306 U.S. 635 (1939); The Katingo Hadjipatera, 40 F. Supp. 546 (S.D. N.Y. 1941), *aff'd*, 119 F. 2d 1022 (2d Cir. 1941), *cert. denied*, 313 U.S. 593 (1941).

[25] Compania Espanola v. The Navemar, 303 U.S. 68, 75-6 (1938); The Baja California, 45 F. Supp. 519 (S.D. Cal. 1942), *aff'd sub nom*, Republic of Mexico v. Hoffman, 143 F. 2d 854 (9th Cir. 1944), *aff'd*, 324 U.S. 30 (1945); The Beaverton, 273 Fed. 539 (S.D. N.Y. 1919). A series of requisition cases during World War II relied upon the rule of the *Navemar* case. The Janko, 54 F. Supp. 240 (E.D. N.Y. 1944), *supplemented*, 54 F. Supp. 241 (E.D. N.Y. 1944); The Ljubica Matkovic, 49 F. Supp. 936 (S.D. N.Y. 1943); The Frederick, 43 F. Supp. 1015 (E.D. N.Y. 1942).

[26] Republic of Mexico v. Hoffman, 324 U.S. 30, 31 (1945); Compania Espanola v. The Navemar, 303 U.S. 68, 74 (1938); Petrol Shipping Corp.

munity — in fact the most prevalent method — is through the Executive Department of the United States. The State Department may suggest or present the claim of immunity to the courts either on its own initiative or at the request of a foreign government;[27] such a suggestion is usually made through the Attorney General. Through this method of suggestion or "recognition and allowance" of a request of immunity from a foreign government, the State Department, in recent years, has played an influential role in the development of the principle of restrictive immunity as applied by the courts.

In 1921, the attitude of the State Department was expressed in a letter to Justice Mack concerning the *Pesaro*[28] case:

> "It is the view of the Department that government owned merchant vessels or vessels under requisition of governments whose flag they fly *employed in commerce* should not be regarded as entitled to the immunities accorded public vessels of war. The Department has not claimed immunity for American vessels of this character. . . ."[29]

Although the Supreme Court in the *Berizzi*[30] case rejected the suggestion of the State Department that the restrictive doctrine be applied, the attitude of the Court in recent years has been to follow the branch charged with

v. Kingdom of Greece, Ministry of Com., 326 F. 2d 117 (2d Cir. 1964); Ervin v. Quintanilla, 99 F. 2d 935, 938 (5th Cir. 1938). See also The Gul Djemal, 264 U.S. 90 (1924), where immunity was denied because it was claimed by a diplomat of another country; The Sao Vicenti, 281 Fed. 111 (2d Cir. 1922), *cert. granted*, 258 U.S. 614 (1922), *cert. dismissed*, 260 U.S. 151 (1922), where a consul general was held not competent to raise a claim of immunity; The Secundus, 15 F. 2d 711 (E.D. N.Y. 1926), where immunity was denied because the claim was presented by private counsel.

[27] SUCHARITKUL, *op. cit. supra* note 8, at 189-90. But see Maru Nav. Co. v. Societa Com. Italiana Di Navigation, 271 Fed. 97 (D. Md. 1921). The court refused immunity on the basis that no suggestion came through the State Department although the Italian consul and ambassador made separate suggestions of immunity.

[28] The Pesaro, 277 Fed. 473 (S.D. N.Y. 1921).

[29] II HACKWORTH, *op. cit. supra* note 6, at 438-39. (Emphasis added.) See also Secretary Lansing's letter of November 8, 1918: "[W]here (government-owned) vessels were engaged in commercial pursuits, they should be subject to the obligations and restrictions of trade, if they were to enjoy its benefits and profits. . . ." II HACKWORTH, *supra* at 429-30.

As to immunity of American vessels see Suits in Admiralty Act, 41 Stat. 525 (1920), 46 U.S.C. §§ 741-52 (1958), providing for exemption of vessels from arrest and seizure but allowing action in personam against the United States where, if the ship were privately owned, a proceeding in admiralty could be maintained. See also Public Vessels Act, 43 Stat. 1112 (1925), 46 U.S.C. §§ 781-799 (1958).

[30] Berizzi Bros. v. Steamship Pesaro, 271 U.S. 562 (1926).

the conduct of foreign affairs.[31] The new attitude of the Court was first reflected in *Mexico v. Hoffman*,[32] where immunity was denied a merchant vessel which was under a claim for ownership by the Mexican Government. The Court stated:

> "[I]t is an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination that the vessel shall be treated as immune. (citation omitted.) But recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations."[33]

According to this dictum the courts would be obligated to follow the restrictive doctrine as advocated by the State Department in its suggestions; yet the Court refused to expressly overrule *Berizzi*.[34]

In May, 1952 after a comprehensive study of the application of the restrictive doctrine by other states, Jack B. Tate, Acting Legal Advisor to the State Department, advised acting Attorney General Perlman that the State Department would continue to follow the restrictive doctrine in recognizing and allowing suggestions of immunity from suit in certain cases.[35] Up to the present, however, there have been no cases decided by the Supreme Court clearly

[31] Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L. L. 168 (1946).

[32] 324 U.S. 30 (1945).

[33] *Id.* at 36. See *Ex parte* Peru, 318 U.S. 578, 589 (1943), where a certification showing that a suggestion of immunity by the Republic of Peru had been "recognized and allowed", the court granted sovereign immunity without question. "The certification and request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations." See also Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E.D. Va. 1961), *aff'd*, 295 F. 2d 24 (4th Cir. 1961). This case held that "recognition and allowance" of immunity was conclusive upon the court despite the unqualified waiver of such immunity prior to such State Department action. The Beaton Park, 65 F. Supp. 211 (W.D. Wash. 1946); The Maliakos, 41 F. Supp. 697 (S.D. N.Y. 1941).

[34] In a concurring opinion, Justice Frankfurter called for the overruling of *Berizzi* in light of the changes in the economic activities of states since that decision and attacked the majority opinion because of their dependence upon the possession test to determine immunity, Republic of Mexico v. Hoffman, 324 U.S. 30, 38 *et seq.* (1945).

[35] 26 Dep't of State Bull. 984 (1952). See generally Setser, *The Immunities of the State and Government Economic Activities*, 24 LAW & CONTEMP. PROB. 291, 307-16 (1959); Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L. L. 93 (1953). As to the statistical study underlying this pronouncement see Timberg, *supra* note 11, at 117-19.

establishing the restrictive doctrine as the policy to be followed by the courts,[36] in relation to state-owned and state-operated merchant vessels.

The courts tend to follow the suggestion of the State Department;[37] however, while the State Department approves of the application of the restrictive doctrine in appropriate cases, the Department itself may not apply it where it would be politically inexpedient to do so.[38] Because diplomatic and political considerations, rather than a determination of whether a governmental activity involved is commercial or non-commercial, are often the determining factors in a decision by the State Department to grant or withhold a suggestion of immunity, their suggestions often appear to be inconsistent with their stated policy of application of the restrictive doctrine.[39] The courts, therefore, have been reluctant to adopt the restrictive doctrine as an invariable policy despite indications in recent cases that the courts are willing to apply the doctrine in appropriate cases.[40]

The State Department has thus far applied the doctrine of relative immunity only to "immunity from jurisdiction"; the immunity of the foreign agency or corporation from execution is still considered, by the State Department, to be absolute.[41] In 1959 a letter was sent by the Legal Advisor of the State Department to the Attorney General concerning the case of *Weilamann v. Chase Manhattan Bank*:[42]

> "The Department has always recognized the distinction between 'immunity from jurisdiction' and 'immunity from execution'. The Department has maintained the view that under international law property

[36] Setser, *supra* note 35, at 314.

[37] Republic of Mexico v. Hoffman, 324 U.S. 30, 35-6 (1945); *Ex parte* Republic of Peru, 318 U.S. 578, 587 (1943).

[38] For discussion of the non-conformity of the State Department with the announced restrictive doctrine see Comment, *International Law — Sovereign Immunity — The First Decade of the Tate Letter Policy*, 60 MICH. L. REV. 1142 (1962); Drachsler, *Some Observations on the Current Status of the Tate Letter*, 54 AM. J. INT'L. L. 790 (1960).

[39] *E.g.*, Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E.D. Va. 1961); New York & Cuba M.S.S. Co. v. Republic of Korea, 132 F. Supp. 684, 685-6 (S.D. N.Y. 1955); Wolchok v. Statni Banka Ceskoslovenska, 12 N.Y. 2d 784, 235 N.Y.S. 2d 3 (Ct. of App. 1962), *cert. denied*, 374 U.S. 828 (1963).

[40] National Bank v. Republic of China, 348 U.S. 356, 358 (1955). Republic of Iraq v. First National City Trust Co., 207 F. Supp. 588, 590 (S.D. N.Y. 1962), *appeal dismissed*, 313 F. 2d 194 (1963). See Three Stars Trading Co. v. Republic of Cuba, 222 N.Y.S. 2d 675 (Sup. Ct. 1961). The court held, upon the basis of the restrictive doctrine, that the foreign sovereign's instrumentality was not immune from *attachment*.

[41] Secretary Rusk's News Conference, 45 STATE DEPT. BULL. 277-S (Aug. 14, 1961).

[42] 21 Misc. 2d 1086, 192 N.Y.S. 2d 469 (Sup. Ct. 1959).

> of a foreign sovereign is immune from execution to satisfy even a judgment obtained in an action against a foreign sovereign where there is no immunity from suit."[43]

However, the court in the principal case, apparently recognizing the frustration of justice which may result from such a distinction, stated that the waiver of sovereign immunity in the present case constituted a waiver of jurisdiction-immunity as well as execution immunity.[44] The dissent argued that waiver of jurisdiction-immunity does not also constitute waiver of execution immunity; that since execution means the sale of the property and the sale is not effected by arrest or attachment, the two should not be equated; and that "satisfaction of the adjudication" should be left to "the channels of diplomacy."[45]

The restrictive doctrine has been criticized by Professor Lauterpacht. He contends that the various nice distinctions which are made by the courts, in attempting to apply the doctrine, have infused an element of artificiality into international law; that a disproportionate amount of the courts' time is required to determine a relatively insignificant issue; and that there are no established rules that can be generally applicated to aid the courts in making the distinctions between commercial and non-commercial uses required under the doctrine.[46]

Despite these criticisms, the restrictive doctrine is to be preferred to the doctrine of absolute immunity which is archaic with respect to contemporary governmental economic realities.[47] As was stated by Judge Haynsworth in a footnote to the principal case:

> "When nations throughout the world began to participate directly in international commerce, reconsideration of the absolute theory of sovereign immunity became appropriate. Appropriateness became compelling when some countries became state traders, engaging, exclusively, or nearly so, . . . in the international

[43] 54 AM. J. INT'L. L. 640, 643 (1960), *citing as authority* Dexter and Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F. 2d 705 (2d Cir. 1930) and Bradford v. Chase National Bank, 24 F. Supp. 28 (S.D. N.Y. 1938).

[44] The Daily Record, August 24, 1964, p. 2, cols. 3-4 (4th Cir. 1964).

[45] The Daily Record, August 24, 1964, p. 2, col. 7 (4th Cir. 1964).

[46] Lauterpacht, *supra* note 9, at 236-50. The author discusses the relative merits of "absolute" and "restrictive" immunity doctrines but suggests as a third and preferred alternative, the assimilation of the foreign sovereign to the position of the territorial sovereign in relation to the privileges and liabilities of its instrumentalities. But see Lillich, *The Geneva Conference on the Law of the Sea and the Immunity of Foreign State-Owned Commercial Vessels*, 28 GEO. WASH. L. REV. 408, 418-19 (1960).

[47] RESTATEMENT, *supra* note 4, § 75 and comments.

carriage of goods and trade, which, in other countries, is left largely to private citizens or companies."[48]

In the completely socialized countries of eastern Europe, the state trading enterprises are the exclusive vehicles of international trade; and in the world's underdeveloped nations, state trading enterprises are the dominant instrumentalities of international commerce.[49] Therefore, a private individual dealing with these agencies would forfeit his judicial remedies for wrongs committed by that agency, which remedies would be available to him against a private person who had undertaken the same type enterprise as that undertaken by the state agency and had committed a similar wrong. Thus, the absolute doctrine, when applied to contemporary economic circumstances, breeds injustice and inequality before the law.[50] Furthermore, the doctrine is contrary to the wider principle which postulates the submission of the instrumentalities of a sovereign to the operation of law as administered by the states.[51] However, if the restrictive doctrine is accepted as the policy of the United States, it should be considered as a substantive legal question, having its foundation in international law; and unless political and diplomatic considerations *require* the State Department to issue a suggestion of immunity, such question should be determined by that branch most competent in treating such issues, the Judiciary. "[F]or that doctrine [restrictive] calls for the essentially judicial process of applying a legal rule to a given set of facts, resulting in an *international law* decision, and is not governed by *foreign relations* considerations."[52]

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[48] The Daily Record, August 24, 1964, p. 2, n. 10 (4th Cir. 1964).
[49] Timberg, *supra* note 10, at 111-13.
[50] Lauterpacht, *supra* note 9, at 220.
[51] *Supra* at 237.
[52] Timberg, *supra* note 11, at 115. The Supreme Court has recently stated:

> "[I]ts [the doctrine] continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427-28 (1964). Although the Court is speaking of the "act of state" doctrine, the principle is equally applicable to the restrictive doctrine of sovereign immunity and to some extent explains the courts' reluctance to treat the question of immunity as a purely judicial question.